AN INCOME MODEL FOR DIGITAL JOURNALISM
Back to the Future

Stephen Nevas
Information Society Project
Yale Law School

before the

Federal Trade Commission

March 10, 2010

Few among us have to strain our memories to remember when we actually paid for news.

The paper boy or girl collected on Saturday, we subscribed, stopped at a newsstand for a paper or news magazine.

When the Internet emerged, our favorite news media migrated to the Web because without a presence there, no enterprise is any longer taken seriously.

The belief in the news business was that the advertising which made journalism's economic viability possible would follow. Advertisers straggled instead, paid less because the proliferation of digital media led to huge, largely unused and less expensive inventories of ad space that drove down rates and still do. Then came the recession and the world changed, probably forever. No one is willing to predict that advertising income will come back to its former levels.

The Nielsen Company recently reported that overall media ad revenues were down 9% last year. Local newspapers took a 10% hit. National papers were down almost 14%. Advertising on the Web remained stagnant, up just one tenth of one per cent.[1]

Journalism's financial foundations continue to crumble. The measurable value to readers and Internet users of what it produces has not.

In Baltimore, the Pew Center for Excellence in Journalism found that during a single week late last year "while the news landscape has rapidly expanded, most of what the public learns is still overwhelmingly driven by traditional media – particularly newspapers." Nearly 50% of all original local reporting was produced by print organizations and reused by other local media. [2]

---

[1] http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=123131, February 25, 2010.
[2] http://www.journalism.org/analysis_report/how_news_happens, January 11, 2010.

Thirty eight per cent of Web users made 78 million unique visits to newspaper Web sites in the third quarter of 2009, an upward trend, according to a study by Nielsen Online for the Newspaper Association of America. [3]

Pew also found that the Baltimore *Sun* "produced 32% fewer stories on any subject than it did in 1999, 73% fewer stories than in 1991…" [4] This trend continues to repeat itself nationwide.

News organizations large and small, print and digital -- broadcast too-- are increasingly unable to adequately monetize what they gather and report.

"The clock is ticking," David Carr wrote recently in the New York *Times*, "on many of the legacy businesses that produce that content."

The central question was posed by Chairman Leibowitz in his opening remarks to us on December 1. Is journalism experiencing "creative destruction" or simply "destruction?"

To which one might add, should we, can we afford to sit back and wait to find out?

What journalists produce can readily be categorized as socially valuable "public goods."

Professor William F. Fisher III at Harvard University describes them. "First," he says, they are "nonrivalrous." In other words, enjoyment of them by one person does not prevent enjoyment of them by other persons. Second, they are "nonexcludable." In other words, once they have been made available to one person, it is impossible or at least difficult to prevent other people from gaining access to them."

Fisher goes on to point out that "potential suppliers…recognize that they would not be able to recover from consumers the costs of producing them." Into this category he places "lighthouses. . . roads, national defense, inventions and recorded entertainment," [5] I would add journalism. News and information are the life blood of our democracy. Citizens, communities and their institutions depend on a steady supply of it to fuel and inform participation in day-to-day decision-making and elections.

What are our options when, as now, the signs point to a market failure or a series of them in journalism?

---

[3] http://www.naa.org/PressCenter/SearchPressReleases/2010/NEWSPAPER-WEB-SITES-CONTINUE-TO-DRAW-MORE-THAN-ONE-THIRD-OF-ALL-WEB-USERS.aspx

[4] http://www.journalism.org/analysis_report/how_news_happens, January 11, 2010.

[5] Fisher, William W. III, *Promises to Keep: Technology, Law, and the Future of Entertainment,* Ch. 6, "An Alternative Compensation System," 1, Stanford University Press, 2004.

Technology-induced market failure has more than once in our history led Congress to adopt content-neutral measures to protect the economic base for the production of “public goods” whose markets have or would otherwise fail.

One hundred and one years ago the player piano, the must-have entertainment system of the day, threatened to deprive song writers and music publishers of the benefits of their creativity. Piano roll manufacturers were reproducing their compositions without paying for the music. Congress stepped in to assure that those whose work was taken without permission would be paid. Lawmakers, when they considered the problem with a cold eye, realized that it was not possible to prevent the reproduction of such public goods but those who did could be made to pay under copyright law. They enacted a compulsory copyright license that allowed anyone to use legally protected music but obligated those who reproduced it to pay royalties to those who create it. [6]

In the years since, Congress has adopted compulsory licenses to provide basic income streams for the owners of content used by public broadcasting[7], retransmission by cable televisions systems[8], subscription audio transmissions[9] and, non-subscription Internet radio.[10]

The primary beneficiary of these compulsory licenses, the music industry has, over the years, organized through voluntary performance rights organizations, BMI, ASCAP, SESAC and the Harry Fox Agency, which are not, due to the r*ule of reason,* viewed as violating ant-trust laws.[11] They negotiate and grant licenses to those who use music, collect and distribute the income.

Could this model, a variant or hybrid of it provide digital journalism with a financial floor and, if so, how?

One of the most difficult challenges facing both news organizations and individual writers is to track down and bring to account those Web site operators who regularly scrape, aggregate and monetize the headlines and stories of others without permission, without paying anything and, sometimes without the scruples to attribute what they republish to the copyright owners of that work.

Key elements of a solution have been right under our noses and are now falling into place, thanks in part to imaginative applications of the same digital technologies that created the problem in the first place.

---

[6] 17 U.S.C. § 115.
[7] 17 U.S.C. § 118
[8] 17 U.S.C. § 111(c)
9C 0 0 740 113.3401 Seethe r BDC /TT0 9

The Fair Syndication Consortium, an alliance of 1,500 newspapers publishers, organized by the software firm Attributor and using its special software to track the extent of the problem, found that during a single thirty-day period late last year 112,000 full copies of their work appeared on unlicensed sites, some of which used the work of its members and others as many as 15 times without permission or compensation.[12] The Consortium has publicly announced that it hopes to use this information to press the advertising agencies who place ads on these sites to "divert revenue from the sale of ads

This suggests that whatever payment model is adopted (and choices are becoming increasingly unavoidable) it ought to be simple, relatively painless, intuitive and universal. One that meets those criteria could be a content license fee to be paid by every ISP on each account it provides and passed on, in whole or in part, to every customer.

The funds would be forwarded to a new division of the Copyright Office, operating under streamlined procedures stripped of some of the onerous and costly procedures which have, in the case of compulsory licensing of distant television signals and Internet radio, made the collection of what copyright owners are entitled as, if not more, expensive than what they receive.

Copyright owners who elect to participate would agree to periodically submit records of their digitized download records to the Copyright Office, those records to be cleansed in advance of information that personally identifies those who use that content.

To prevent gaming this system, the Copyright Office would commission market-by-market sampling by organizations like Nielsen, ARB and Comscore to cross check the download records with special attention to smaller communities. The data would be compared, using a predetermined formula and compensation could be distributed directly or through copyright rights organizations to their members.

These funds should not pay all of a news organization's expenses or assure a profit. They could provide a financial floor that allows them to leverage additional income.

This model, applied to digital journalism in all of its forms, would help to create